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No. 97-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VISTA PAINT CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE ENVIRONMENTAL, LEGISLATIVE, AND REGULATORY ADVOCACY PROGRAM OF THE CALIFORNIA PAINT AND COATINGS INDUSTRY ALLIANCE IN SUPPORT OF THE PETITION

WILLIAM M. SMILAND
Counsel of Record
SMILAND & KHACHIGIAN
601 West Fifth Street
Seventh Floor
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF *AMICUS CURIAE* [1]

The Environmental, Legislative, and Regulatory Advocacy Program of the California Paint and Coatings Industry Alliance ("EL RAP") is a trade organization whose membership is composed of local or regional coat-

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[1] This brief *amicus curiae* is being filed with the written consent of both petitioner and respondent. As required by United States Supreme Court Rule 37.2, letters evidencing such consent are being simultaneously filed with the Clerk of the Court. Further, pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored the brief in whole or in part and no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

ings manufacturers, dealers, contractors, suppliers of raw materials, equipment, and services to the paint industry, and organized labor. EL RAP's approximately 75 members make, sell, and use a major share of the paints and coatings in California.

In the case at bar, the majority of the civil penalty assessed against Vista Paint Corporation ("Vista"), one of EL RAP's members, was for sales of architectural coatings containing organic compounds in excess of a limit imposed initially by local agencies and thereafter approved by a state and then a federal agency. Although the effective date of the limit forming the basis of the federal enforcement action had been subsequently extended by the local and state agencies, Vista was precluded from asserting the original invalidity of that limit under state law as a defense to the federal enforcement action. The amendment of a local district rule, a variance therefrom, or the judicial invalidation thereof is not uncommon. However, EL RAP members have no capacity, as a practical matter, to monitor, let alone challenge, hundreds of local, state, and federal actions taken to adopt and approve the continual stream of rule amendments and plan revisions affecting their products. Indeed, sustaining such challenges is often legally impossible. Without the ability to challenge the validity of the underlying local and state regulations as a defense to a federal enforcement action, these companies will be effectively precluded from ever asserting such claims.

Accordingly, EL RAP's members have a strong interest in resolving the important question, on which the circuits are split, of whether Section 307(b)(2) of the Clean Air Act ("CAA") may be interpreted to preclude such a defense and, if so, whether doing so comports with fundamental principles of due process.

STATEMENT OF THE CASE

Hundreds of varieties of organic compounds are emitted from thousands of consumer and commercial products.

Different types of organic compounds have greatly differing degrees of volatility and of reactivity and, hence, the ability to promote the accumulation of ground level ozone. Whether, and the extent to which, any organic compound promotes ozone formation also depends on numerous environmental factors such as ambient temperature, the mix of organic compounds, and the ratio thereof to oxides of nitrogen, the direct precursor of ozone.[2] The type of organic compound in solvent-borne paints is typically mineral spirits, whereas the type in water-borne paints is typically glycol compounds. App. 48a.

Respondent U.S. Environmental Protection Agency ("EPA") recognizes more than 50 separate categories of architectural coatings. Each has been regulated by more than a score of local air quality districts and one state agency established in California to implement clean air legislation. Thus, literally hundreds of combinations and permutations of rulemaking are possible.

Here, the District Court assessed, among other things, a civil penalty of $559,000 against Vista for violations of the CAA based on sales after September 1, 1985 and before October 12, 1987 in two local districts of solvent-borne enamel house paint containing more than 250 grams per liter ("g/l") of organic compound.[3] Although each of Vista's penalized sales complied with the limit under the extended deadline of local and state regulations, EPA nevertheless subjected Vista to federal enforcement of the limit in effect under the prior deadline.

The District Court held at the pleading stage that it lacked jurisdiction over Vista's affirmative defenses against EPA and claims against the local and state agencies alleg-

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[2] See National Research Council, *Rethinking The Ozone Problem in Urban and Regional Air Pollution* (National Academy Press, Washington, D.C., 1992)

[3] The penalty was $500 per day prior to June 24, 1987 (the day 40 companies, including Vista, received notices of violation) and $2,500 per day thereafter. App. 33a.

ing the initial invalidity of the limit under state law. App. 89a-93a. The Ninth Circuit affirmed in the first of two appeals, holding that Vista had "ample opportunity" to comment on and challenge EPA's approval thereof under CAA Section 307. App. 15a, 36a.

EL RAP respectfully submits that, for the reasons stated below, this Court should grant certiorari to decide this important jurisdictional question. There is a conflict among the circuits as to the proper interpretation of Section 307, and that split should be resolved. Furthermore, if the preclusive interpretation followed by the Ninth Circuit is applied, significant due process questions arise.

LEGAL ARGUMENT

I. WHILE THE STATE RULES WERE ADOPTED AND APPROVED IN VIOLATION OF STATE LAW, THEY COULD NOT HAVE BEEN INVALIDATED IN STATE COURT.

Vista argued during the initial phase of the case that the limits it was found to have violated originally "had been promulgated in violation" of state law and were, therefore, "invalid." Pet. 6, 9. EL RAP invites the Court's attention to the facts that (a) the two rule amendments relating to architectural coatings at issue here were invalidly adopted and approved under state law, and (b) it is virtually certain that no EL RAP member could have mounted a successful challenge to the validity of such amendments in state court.

By way of background, the process California has employed to regulate architectural coatings during the past two decades is complex. First, local rules are adopted and amended, and enforced at the local level, by more than a score of county or regional air districts. Second, each district follows the so-called "technology-forcing" approach to such rulemaking. Third, each district has tended to amend its rule on a frequent basis. Fourth, every rule amendment adopted by every district is sub-

mitted to the California Air Resources Board ("ARB") for approval as state law. Fifth, ARB then submits them to EPA for approval as federal law. As discussed below, the interaction of these five factors bears significantly on the issues of concern to EL RAP.

A. The Local Rule Amendments Were Adopted By The Districts Unlawfully, But Were Not Judicially Voidable.

South Coast Air Quality Management District ("South Coast AQMD") first adopted its Rule 1113 regulating the organic compound content of architectural coatings in 1978. App. 49a. Rule 1113 was amended by South Coast AQMD on a roughly annual basis thereafter. Rule 1113 govers numerous categories of architectural coatings and prohibits the manufacture, sale or use of each such category over a certain limit of organic compounds. App. 5a. One such category is so-called "non-flat" coatings, or glossy enamels used on windows and doors and in kitchens and bathrooms. App. 5a. During the early years South Coast AQMD had experimented with several non-flat limits, including 450 g/l, which required reformulation of only a few non-flat products, and 250 g/l, which would effectively have outlawed most solvent-borne such products. In 1981, however, a compromise limit of 380 g/l was adopted for the near term, which required most non-flats to be reformulated, but still allowed merchantable products to be made, sold, and used. App. 20a. Since 1981, amendments to South Coast AQMD Rule 1113 retained the 380 g/l limit in the near term, but simultaneously adopted the "technology forcing" limit of 250 g/l to become effective at a future date. App. 52a, 53a.

Of particular relevance here, on March 16, 1984, South Coast AQMD adopted its ninth version of Rule 1113, which prohibited the sale or use of any non-flat coating exceeding the 380 g/l limit until September 1, 1985, but the 250 g/l limit thereafter. App. 5a.

During the late 1970s and early 1980s San Diego Air Pollution Control District ("San Diego APCD") followed the same pattern. San Diego APCD's 1984 amendment to its Rule 67.0 was substantially identical to that adopted by South Coast AQMD. In particular, it also fixed the 380 g/l limit for non-flat coatings until September 1, 1985, but the 250 g/l limit thereafter. App. 5a.

There are more than 20 other air districts in California in addition to South Coast AQMD and San Diego APCD. During the late 1970s and early 1980s many of them were simultaneously following the same regulatory approach. They also took actions similar to those taken by South Coast AQMD and San Diego APCD in early 1984.

After adoption of the two rule amendments in question, this pattern continued throughout California. In particular, districts repeatedly amended their architectectural coating rules, among other things, to extend the effective date of the drop in the non-flat limit from 380 g/l to 250 g/l. Thus, EL RAP members have been affected by the outcome of roughly 100 different local rulemaking proceedings during the past 20 years.[4]

This Court recognizes the role of state law in implementing the CAA. It stated in *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976) (*"Union Electric I"*), as follows: "Perhaps the most important forum for consideration of claims of economic and technologic infeasibility is before the state agency formulating the implementation plan." During most of the major local rulemakings, including the two at issue here, EL RAP members did present substantial evidence and argument about the economic and technological infeasibility of the future-effective 250

[4] As discussed below, each such amendment, in turn, was subjected to two further administrative reviews, one by ARB and then another by EPA. Accordingly, EL RAP members have had an interest in approximately 300 rulemaking proceedings during this period.

g/l limit for non-flats. District boards well understood that that future-effective limit was infeasible, but retained it as a spur to possible technological development.

As further stated in *Union Electric I*, ". . . an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic and technological infeasibility to the state courts. [citations]" 427 U.S. at 266-67. Such legal claims existed with respect to the future-effective 250 g/l limit, including the limit contained in South Coast AQMD's and San Diego APCD's early 1984 rule amendments. Pet. 6, 9.

For example, in 1984 the California Environmental Quality Act ("CEQA"), mandated that an agency analyze the adverse environmental impacts of any project. Cal.Pub.Res. Code § 21000 *et seq.* Neither South Coast AQMD nor San Diego APCD prepared a report analyzing the significant adverse environmental impacts of the non-flat ban scheduled to take effect September 1, 1985. Accordingly, those technologically infeasible bans of non-flat paints were voidable under CEQA. *Dunn-Edwards Corp. v. Bay Area Air Quality Management District*, 9 Cal. App. 4th 644, 653-58 (1992) (". . . [T]he new regulations require lower quality products. As a result, more product will be used, which will lead to a net increase in VOC emissions.").

Similarly, an air district was required to analyze the economic impacts of any rule amendment. *Western Oil & Gas Assoc. v. ARB*, 37 Cal.3d 502, 517, 518, 520, 524 (1984).[5] Neither South Coast AQMD nor San Diego APCD assessed the economic impacts of the future-

[5] Since 1984 the California Legislature has repeatedly clarified and enhanced this duty. Cal. Health & Safety Code §§ 40440, 40440.8, 40440.11, 40703, 40728.5, 40922; *Alliance of Small Emitters/Metals Industry v. South Coast AQMD*, 60 Cal. App. 4th 55, 64 (1997).

effective non-flat ban. Accordingly, the economically infeasible 250 g/l limits were unlawful on this ground, as well.

EL RAP members did not bring state court suits to challenge South Coast AQMD's or San Diego APCD's future-effective ban of non-flat coatings in the 1984 rule amendments. It would have been impractical to mount such challenges and, had they done so, any such claims of invalidity would have been mooted by subsequent corrective action at the administrative level.

Prior to effectiveness of the scheduled drop on September 1, 1985 of the non-flat limit to 250 g/l, South Coast AQMD, as had been its consistent pattern in the past, again amended Rule 1113, this time extending the deadline four years to September 1, 1989. App. 20a.

At about the same time, San Diego APCD made the same correction by, first, amending the rule and, second, granting the paint industry a class variance, which together had the effect of extending the then-scheduled ban on non-flats to August 31, 1987.[6] App. 11a-12a, 20a, 53a.

At all times between March 1984 and mid-1985 it was entirely reasonable for EL RAP members to refrain from instituting state court suits against South Coast AQMD, San Diego APCD, and other districts. Indeed, instituting multiple protective litigations at that time would have been highly impracticable. Corrective action at the administrative level had always been taken before. Indeed, corrective actions were again taken in 1985, either in the form of further rule amendments, or variances.

In any event, even if EL RAP members had instituted multiple protective lawsuits prior to mid-1985, those suits

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[6] On August 31, 1987 Vista applied for a further variance. The hearing board of the San Diego APCD later denied that variance and on October 12, 1987 Vista relented. App. 11a-12a.

would have become moot upon the occurrence of such corrective actions and could not have been maintained thereafter. *Paul v. Milk Depots, Inc.*, 62 Cal.2d 129, 133-34 (1964).

B. The Local Rule Amendments Were Approved By ARB Unlawfully, But Were Not Judicially Voidable.

ARB is bound to review all district rule amendments and variances to determine whether they meet the requirements of both state and federal law and, if so, approve them for inclusion in the state plan. Cal. Health & Safety Code §§ 39602, 41500(b), 41504(a), 41650(a), 41652. The early 1984 amendments to South Coast AQMD's Rule 1113 and San Diego APCD's Rule 67.0, including the September 1, 1985 bans of non-flat coatings, were reviewed and approved by ARB in 1984.

EL RAP contends that each such ARB approval was a "project" subject to environmental review under CEQA. *Bozung v. Local Agency Formation Commission*, 13 Cal.3d 249, 277-79, 285 (1975); *Fullerton Joint Union High School District v. State Board of Education*, 32 Cal.3d 779, 794-97 (1982). ARB did not prepare any report analyzing the significant adverse environmental impacts of the two approvals at issue. *Dunn-Edwards*, 9 Cal. App. 4th at 658. Thus, ARB's approvals of the two rule amendments in question was unlawful and voidable under CEQA.

ARB is also bound to analyze the economic impacts of any regulation. Cal. Government Code §§ 11346.14, 11346.4, 11346.5, 11346.53, 11346.55, 11346.7. EL RAP contends that each such approval constitutes the adoption of a "regulation" subject to economic analysis. *Id.* at §§ 11342(b), 11346, 11347.5; *State Water Resources Control Board v. Office of Administrative Law*, 12 Cal. App. 4th 697, 700-03 (1993). ARB did not analyze the

economic impacts of either approval at issue. Accordingly, each was voidable on this basis, too.

ARB subsequently approved the districts' corrective rule amendments and variances. Once those approvals occurred, any claims against ARB challenging the prior approvals would have become moot and could not have been prosecuted.

II. EPA'S APPROVALS OF THE TWO PLAN REVISIONS WERE NOT CHALLENGEABLE IN A PETITION FOR REVIEW IN THE NINTH CIRCUIT BASED ON THE ORIGINAL STATE LAW VIOLATIONS.

In 1984 ARB submitted to EPA various plan revisions, including the two at issue here, for review and approval under Sections 110 and 172 of the CAA, as then in effect. 42 U.S.C. §§ 7410, 7502 (1977), amended 1990. On July 24, 1985 EPA approved those submissions. App. 6a.

EL RAP members could not have challenged EPA's approvals of the two non-flat bans in a Ninth Circuit petition for review under Section 307. Neither Section 110 nor 172 authorized EPA to review plan revisions for technological or economic infeasibility.

As stated by this Court in *Union Electric I*, ". . . claims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state reqiurement . . ." 427 U.S. at 265. Thus, as Vista correctly states, ". . . claims of economic and technological infeasibility are beyond the EPA's authority to consider in the SIP approval process . . ." Pet. 11.[7]

As also held by this Court, it necessarily follows that "a court of appeals reviewing an approved plan . . .

[7] The Ninth Circuit was manifestly incorrect in holding that Vista had "ample opportunity" to submit comments to EPA about the infeasibility of the bans. App. 36a.

cannot set it aside on those gorunds, no matter when they are raised." *Union Electric I*, 427 U.S. at 265-66. Accordingly, an EL RAP member ". . . could not have raised such challenges involving economic and/or technological feasibility in a direct challenge to the EPAs adoption of the California SIP." Pet. 9.[8]

Even if the CAA and its interpretation by this Court were otherwise, any rights EL RAP members might arguably have had to object to, or challenge, EPA's approvals would not have been "meaningful." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has recognized just how limited one's opportunity is to comment upon and challenge EPA approvals of plan revisions.

As noted by the court in *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 283 n.2 (1978):

> "The severity of the scheme is accentuated by the fact that persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the [appropriate circuit] to protect their interests."

Justice Powell, in his concurring opinion in *Adamo Wrecking*, questioned whether this procedure passed muster under the due process clause, saying: "No notice is afforded . . . other than publication of the Administrator's action in The Federal Register." *Id.* at 289. He further noted:

> "[T]here is no more assurance that notice of proposed standards will come to the attention of the thousands of persons and entities affected than that notice of their actual promulgation will. Neither is it realistic to assume that more than a fraction of these

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[8] Again, the Ninth Circuit was clearly wrong when it ruled that Vista had "ample opportunity" to challenge EPA's approvals. App. 36a.

> persons and entities could afford to follow or participate in the Administrator's hearing." *Id.* at 289 n.1.

Justice Powell added:

> "The . . . [short time] limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Id.* at 290.

In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 n.9 (1980) this Court noted the above due process issue but said that, since it was not at issue in that case, it "must . . . await another day." In another concurring opinion, Justice Powell repeated his "reservations about the constitutionality of the notice and review preclusion provisions of § 307(b). [citation]" *Id.* at 594. He wrote: ". . . [P]ublication in the Federal Register still is unlikely to provide constitutionally adequate notice that a failure to seek immediate review will bar affected parties from challenging the noticed action . . ." *Id.*

Vista correctly states that, at the time of EPA review and approval, ". . . the precise interests of all who might be affected are hypothetical and unfocused." Pet. 12. It further argues:

> "The opportunity to challenge a regulation at the time the EPA adopts a SIP is no opportunity at all, as most potential targets of that regulation are unaware that it may eventually be enforced against them. Vista, for one, does not (and cannot afford to) pay a staff of lawyers to comb through the Federal Register every day to see if any of its interests might be affected by revisions to a SIP." Pet. 13.

When EPA reviewed and approved the two plan revisions at issue in late 1984 and early 1985, most EL RAP

members were undoubtedly unaware that it was doing or had done so. App. 48a. Even if they acquired such knowledge, they would reasonably have believed, as had always happened in the past, that South Coast AQMD and San Diego APCD would correct the scheduled but infeasible non-flat bans by administrative action, that ARB would approve those corrective actions, and that EPA would also again do so, as well.[9] Even if any member had known of EPA's early 1985 approvals of the two plan revisions at issue, and deemed it prudent to attempt suit in the Ninth Circuit out of an abundance of caution, no member could have afforded the cost of multiple protective litigations.

In short, Section 307 provided EL RAP members with no remedy at all for the prior failures of the districts and ARB to assess technological and economic infeasibility, as mandated by state law. And, if it had, the remedy would have been constitutionally insufficient.

III. THE FIRST TIME TO RAISE STATE LAW INVALIDITY ISSUES WAS AS A DEFENSE TO AN EPA ENFORCEMENT ACTION.

As shown above, EL RAP members, including Vista, could not have invalidated the non-flat bans in question in either state or federal court. The first opportunity Vista had to raise these violations was in EPA's enforcement action.

In 1973 the Sixth Circuit held that claims of state law invalidity based on technological and economic infeasi-

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9 As it turned out, to the great surprise of EL RAP members, EPA stealthily changed policy. For two years, between mid-1985 and mid-1987 EL RAP members openly sold non-flat coatings throughout California, believing such sales to be lawful. EPA shocked the entire industry when it issued notices of violation to 40 companies on June 24, 1987 asserting that all of those sales had violated federal law. App. 13a, 21a, 48a-50a. EPA ultimately denied approval of South Coast AQMD's corrective amendment in 1989. App. 20a. It never passed on San Diego APCD's corrective actions. App. 20a.

bility can be asserted as a defense in a federal enforcement proceeding. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 165, 173 (6th Cir. 1973). Two years later the Seventh Circuit followed suit. *Indiana & Michigan Electric Co. v. EPA*, 509 F.2d 839, 844-45 (7th Cir. 1975). In *Union Electric I*, this Court noted *Buckeye Power* and *Indiana & Michigan Electric*, but declined to address the question. 427 U.S. at 268 n.18. In two cases decided during the late 1970's the Eighth Circuit followed that rule. *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977); *Union Electric Co. v. EPA*, 593 F.2d 299, 304, 306, 307 (8th Cir. 1979).

In the case at bar, however, the Ninth Circuit joined another circuit in broadly—and, EL RAP contends, erroneously—construing Section 307(b)(2) to preclude such a defense. Thus, there exists a clear conflict of the circuits on this important point. EL RAP contends that a circuit conflict exists, this Court should resolve it, and the rule followed in the Sixth, Seventh and Eighth Circuits is the correct one for three reasons, discussed below.

A. Section 307(b)(2) Does Not Preclude The Defense.

As shown in Vista's petition and above, neither Section 110 nor Section 172 of the CAA authorized EPA to consider technological or economic infeasibility. Accordingly, EPA's 1985 approval of each non-flat ban in question was not "[a]ction" of a type for which "review could have been obtained" in a Ninth Circuit petition for review under Section 307(b)(1). Therefore, Vista "could not have raised such challenges . . . in a direct challenge." Pet. 9.

Because Vista could not have filed a circuit court petition under Section 307(b)(1) claiming that EPA had violated Sections 110 and 172, an important question exists, over which the circuits are surely divided, as to whether Vista was precluded under Section 307(b)(2) from raising its invalidity defenses in EPA's later enforce-

ment suit. This Court should grant certiorari to decide this important question, and if granted, apply the correct statutory interpretation followed in the Sixth, Seventh, and Eighth Circuits.

B. If Interpreted Preclusively, Section 307(b)(2) Violates The Due Process Clause.

If Section 307 were interpreted preclusively, judicial review would not be meaningful nor, therefore, meet due process requirements. As Vista correctly states: ". . . [T]he most meaningful time to be heard" is at the enforcement stage when a company's "interests in the validity of a regulation become concrete." Pet. 12-13.

If the statutory interpretation of the Ninth Circuit is correct, the important due process question previously noted by Justices of this Court should be resolved, and the particularly stark facts of this case provide an opportune setting for doing so.

The necessary implication of the ruling challenged in the instant petition is that EL RAP members should have been digging deep into their pockets (and, consequently, court budgets) and instituting 100 protective state court suits against local districts every time they adopted a technologically and economically infeasible future-effective technology-forcing limit, and 100 more suits every time ARB approved it. Even if this strategy were affordable at all, it would have led to nothing but waste, as each of the 200 state court suits would have been mooted by subsequent corrective actions voluntarily taken by the districts and ARB. Thus, the theoretical possibility of state court suits is not constitutionally meaningful.

Nor would 100 additional petitions for review of EPA's approvals in the Ninth Circuit have been meaningful. Even if EL RAP members were assumed to have known about the EPA proceedings and approvals and to have been able to afford to participate in the former and challenge the latter (both unrealistic assumptions), such suits would also have been later mooted by EPA's approval of

state corrective actions—except the two corrective actions taken here. To everyone's surprise, EPA did not act upon the South Coast AQMD measure until 1989 and then disapproved it. EPA never acted on the corrective measures adopted by San Diego APCD. EL RAP members had been making and selling non-flats at all times between mid-1985 and mid-1987. This was with the full knowledge and permission of the districts and ARB and, until June 24, 1987, by which time a petition for review was time-barred, the apparent acquiescence of EPA.

In summary, even if judicial review had been available to challenge the prior state law violations, such review would not have been meaningful, as required by the due process clause.

C. The Rule Amendments Were Voidable From Inception And Neither Approvable Nor Enforceable By EPA.

EL RAP believes that a related point, not explicitly advanced by Vista, supports a grant of certiorari. Where a state court has invalidated a state air pollution control rule, a plan revision based thereon is not enforceable in federal court. *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1148 (7th Cir. 1983) ("since a valid [rule] was never submitted, EPA's adoption of [the invalid rule] cannot be given effect . . .").[10]

The same rule should apply whether the invalidity of the state rule is determined before EPA review, or after it. The timing of the invalidation of the state rule should not be determinative. If the state agency initially acted in violation of state law, that basic error at the front end of

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10 Accord: *New Mexico Environmental Improvement Division v. Thomas*, 789 F.2d 825, 833 (10th Cir. 1986); *cf. U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987) (holding *Sierra Club* to be distinguishable where state regulators change their views and enter a consent decree purporting to vacate and modify the plan as of its compliance date).

the process should preclude federal enforcement at the back end. Otherwise, state and federal authorities may engage in a race, with state courts rushing to rule, or EPA rushing to prosecute, more rapidly than would otherwise be the case. And if the timing is irrelevant, as EL RAP contends, then an appropriate time and place to test the state law claims—here, the only practical time and place—is in the federal enforcement action.

If, as shown above, a state rule adopted in violation of state law is neither approvable nor enforceable by EPA, then the circuit conflict correctly identified by Vista, and its resolution by this Court, become even more significant.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

WILLIAM M. SMILAND
Counsel of Record
SMILAND & KHACHIGIAN
601 West Fifth Street
Seventh Floor
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Amicus Curiae

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